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87-1254

Supreme Court, U.S.

FILED

JAN 6 1988

JOSEPH F. SPANOL, JR.
CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1988

JOHN F. KILGROE,

Petitioner,

vs.

ARMAND ARABIAN, GEORGE DANIELSON,
ELWOOD LUI, HERBERT ASHBY, ROBERT
FEINERMAN, JAMES H. HASTINGS,
LESTER WILLIAM ROTH, LYNN D. COMPTON,
EDWIN F. BEACH, ROSE ELIZABETH BIRD,
STANLEY MOSK, OTTO KAUS, ALLEN BROUSSARD,
CRUZ REYNOSO, JOSEPH GRODIN, MALCUM L.
LUCUS, RICHARD M. PITTINGER, PHYLLIS
PITTINGER, MARY PITTINGER, JOHN R. SKOOG,
JEROL HODGES, RICHARD E. HODGES,
JOAN DEMPSY KLEIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN F. KILGROE, PRO SE
VON MIZENER AND VON MIZENER
2067 S. Atlantic Boulevard
Los Angeles, California 90040
(213) 264-1422

87-1254



QUESTIONS PRESENTED FOR REVIEW

Plaintiff filed nineteen sets of unanswered request for admissions and moved for judgment on the pleadings for \$597,000.00. The motion was never ruled on and Plaintiff never received a trial on the merits.

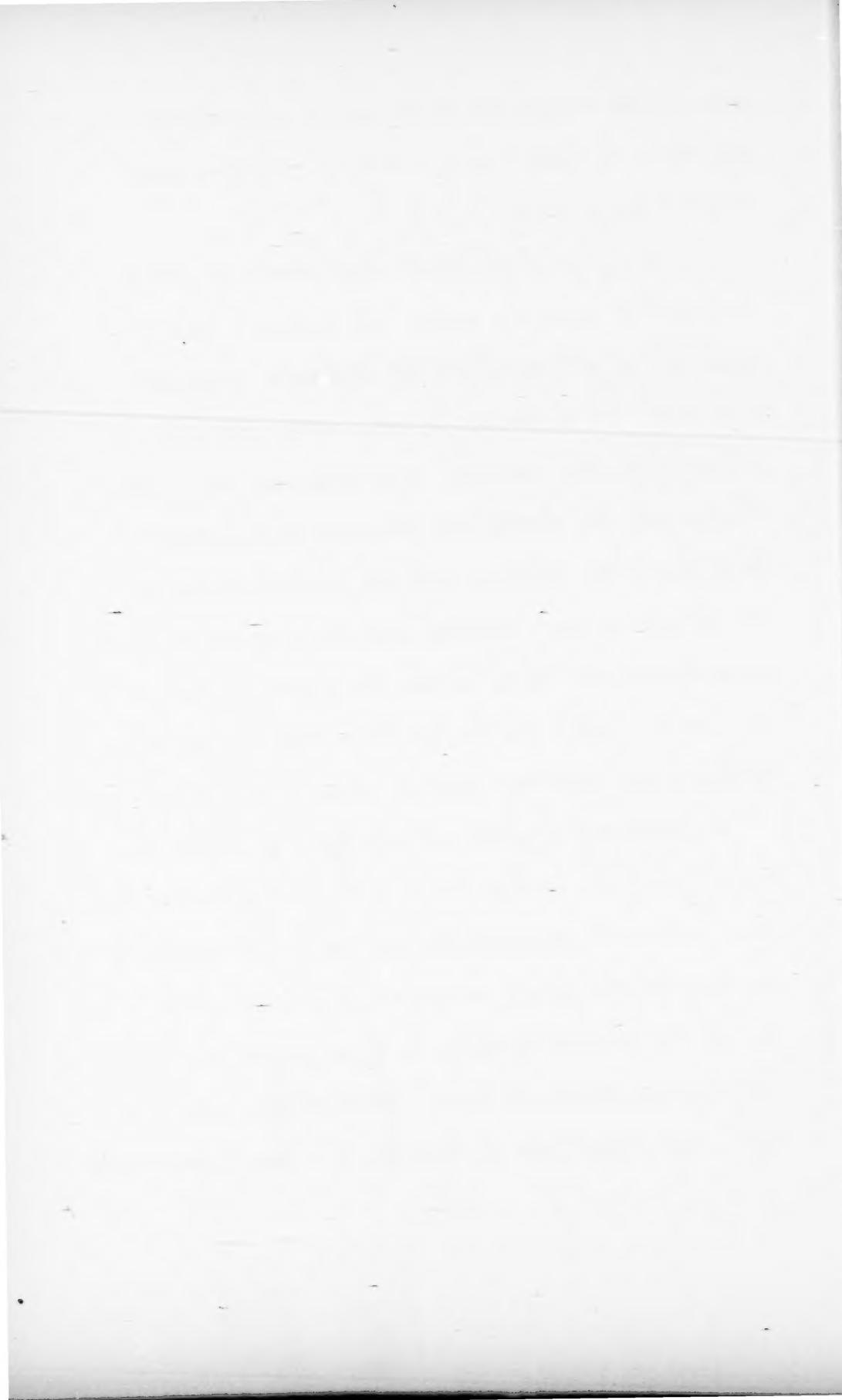
1. Whether the State Court may, without reaching the merits and without indicating any reason, dismiss a complaint with prejudice.
2. Whether the State Court judges may be enjoined from finding an "indispensable party" in a tort action for money damages when such actions have no such parties and when the judges have three times deprived Plaintiff of a trial on the merits with such a finding.
3. Whether the justices of the California intermediate court of appeal may be compelled to issue their precalendar memorandum to counsel prior to oral argument or take



any other steps to curb their pervasive pattern of arbitrary conduct using unpublished opinions.

4. Whether Plaintiff may state a claim for money damages under 42 U.S.C., §1983 against a State Court of Appeals Justice who was not sitting on any case and was therefore not immune, for arguing against Plaintiff in chambers thereby depriving Plaintiff of notice and an opportunity to be heard on her amicus curiae arguments and breaching her duty under California Rules of Court, Rule 14(b) to file her brief and argue from the bar rather than the bench.

5. Whether Plaintiff alleges a claim for money damages under 42 U.S.C., §1983 against non-judicial defendants who were defendants in his state court action, who allegedly filed frivolous briefs in violation of California Code of Civil Procedure, Section 907, and resulted in Plaintiff being deprived



of a trial on the merits, or must Plaintiff go back to state court to get his judgment.

6. Whether the Ninth Circuit may deny oral argument when their memorandum bears no resemblance to the briefs which deprives Plaintiff of notice and an opportunity to be heard on issues raised by the court or is Ninth Circuit Local Rule 34-4 unconstitutional.

THE PARTIES

I, John F. Kilgroe, am the sole plaintiff. Defendants on the California Court of Appeal are Armand Arabian, George Danielson, Ellwood Lui, Herbert L. Ashby, James Hastings, Lester Wm. Roth, Lynn D. Compton and Joan Dempsey Klein. Edwin Beach has retired and should be dropped. I believe James Hastings has also retired. Robert Feinerman is retiring in February, 1988, and should be dropped.



Since the reissuance of Ashelman v. Pope (9th Cir., 1986) 793 F.2d 1072, money damages are only sought against Joan Dempsey Klein. Members of the California Supreme Court are sued in their official capacity only and originally included Justices Bird, Kaus, Reynoso and Grodin who should be replaced with Justices Panelli, Arguelles, Eagleson and Kaufman. Justices Mosk, Brossard and Lucas are also named. Non-judicial defendants are Richard M. and Phyllis Pittenger, Mary Pittenger, John R. Skoog, Esq., Jerol Hodges, Esq. and Richard E. Hodge, Esq.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The following unpublished opinions
have been issued by the California Court
of Appeal: Kilgroe v. Pittenger, numbers



2nd Civil 63934, 2nd Civil 67349 and B005895.

The Ninth Circuit Court of Appeals issued memorandum 86-6514 and denied without comment the petition for rehearing.

JURISDICTION

The memorandum of the Court of Appeals was entered on August 10, 1987 (Appendix A). A timely petition for rehearing was denied on October 9, 1987 (Appendix B). This Petition for Certiorari is being filed within ninety days of that date which is timely (28 U.S.C. §2101(c)). The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

THE OPINIONS, STATUTES AND RULES INVOLVED

The three State Court opinions are too lengthy to appear here and are included in the Appendices as Appendix F, G and H. California Code of Civil Procedure, Section

389 is as follows:

"(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

"(b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or to those already parties; (2) the



extent to which, by protective provisions in the judgment, by shaping relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the persons absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

(Sections (c) and (d) are not relevant.)

California Rules of Court, Rule 976(b)

is:

"No opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule, (2) involves legal issues of a continuing public interest or (3) criticizes existing law."

Ninth Circuit Local Rule 34-4 is:

"Pursuant to FRAP 34(a), there is hereby established a class of cases to be submitted without oral argument. There may be placed in this class any appeal, petition for original writ, or petition for review or enforcement of an administrative order in which a 3-judge panel of this court is of the unanimous opinion



extent to which, by protective provisions in the judgment, by shaping relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the persons absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

(Sections (c) and (d) are not relevant.)

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is:

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that:

- (a) the appeal is frivolous;
- or
- (b) the dispositive issues or set of issues has been recently authoritatively decided; or
- (c) the facts and legal argument are adequately presented in the briefs and record and the decision process would not be significantly aided by oral argument.

Oral argument will be allowed in each case absent a specific finding pursuant to this rule that oral argument is not needed.

When a case has been classified by the court for submission without oral argument, the clerk shall give the parties notice in writing of such action. The parties shall have 10 days from the date of the clerk's letter in which to file a statement setting forth the reasons why, in the opinion of the parties, oral argument should be heard.

STATEMENT OF THE CASE

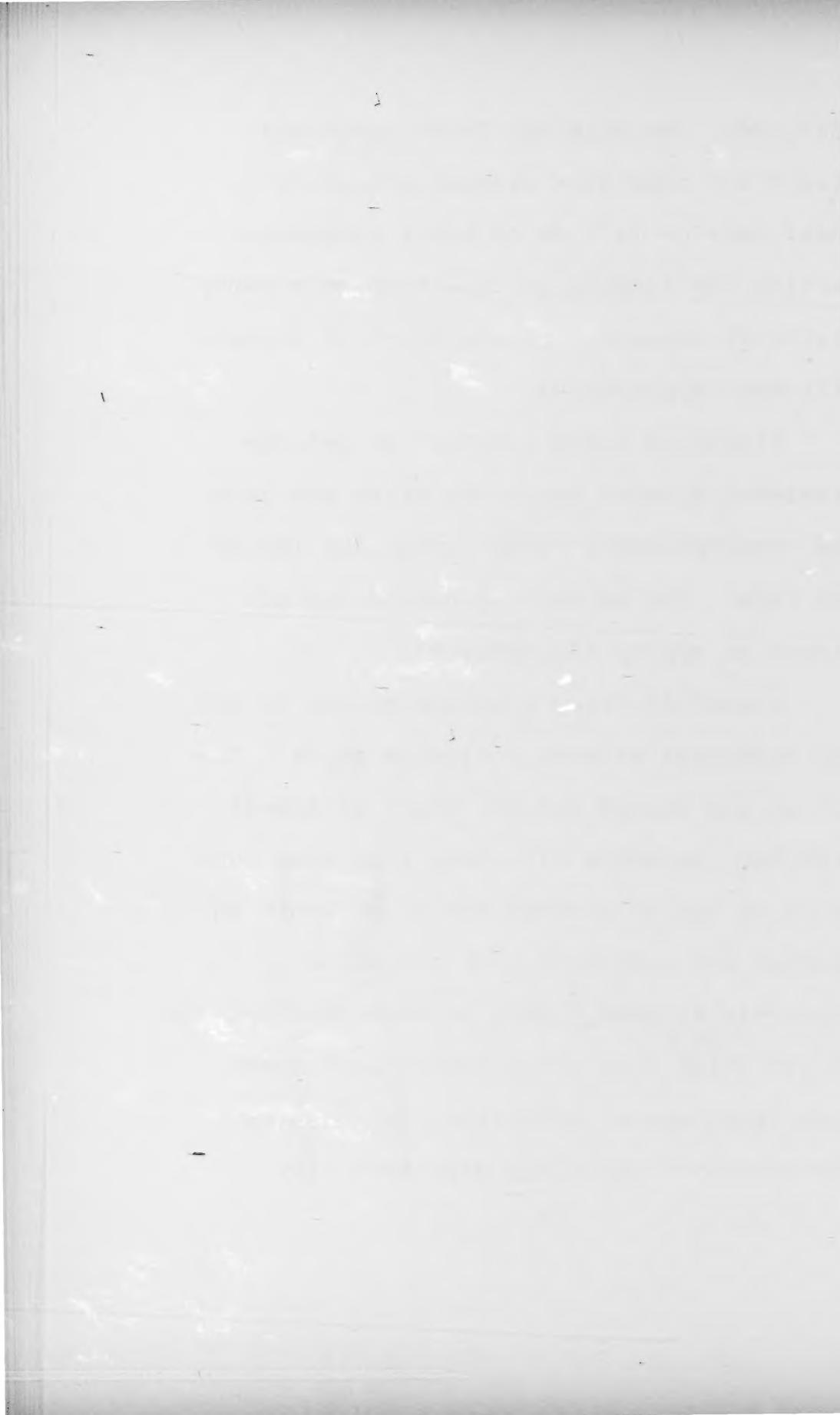
Plaintiff filed a tort action for money damages in the Los Angeles Superior Court. After filing nineteen sets of unanswered request for admissions Plaintiff moved for judgment on the pleadings for



\$597,000. The Superior Court Judge dismissed the complaint without prejudice under California Code of Civil Procedure, Section 389 finding an "indispensable party." Plaintiff appealed and the Court of Appeals affirmed (Appendix H).

Plaintiff filed a motion to set the dismissal without prejudice aside and join the "indispensable party" under the law of the case. The motion was denied and affirmed on appeal (Appendix G).

Plaintiff filed a second motion to set the dismissal without prejudice aside. The motion was denied and the Court of Appeal affirmed (Appendix F). Only this time the Court of Appeal ordered the trial court to dismiss the complaint with prejudice (Appendix F, page F-28), without reaching the merits which were ruled superfluous (page F-26, footnote 1, and without stating why the complaint was being dismissed with



prejudice.

Petition for rehearing was denied and the California Supreme Court denied review. Plaintiff then filed this action in the United States District Court, Central District of California, who dismissed the complaint (Appendices C and D), and denied motion for new trial (Appendix E). Plaintiff appealed to the Ninth Circuit who affirmed (Appendix A), and denied rehearing (Appendix B). Plaintiff then filed this writ.

Plaintiff has timely raised each issue presented to this court in the courts below.

FEDERAL COURT JURISDICTION

Plaintiff brought this action in the United States District Court for the Central District of California seeking injunctive relief, damages and attorney fees under 42 U.S.C., §§ 1983 and 1988 and declaratory

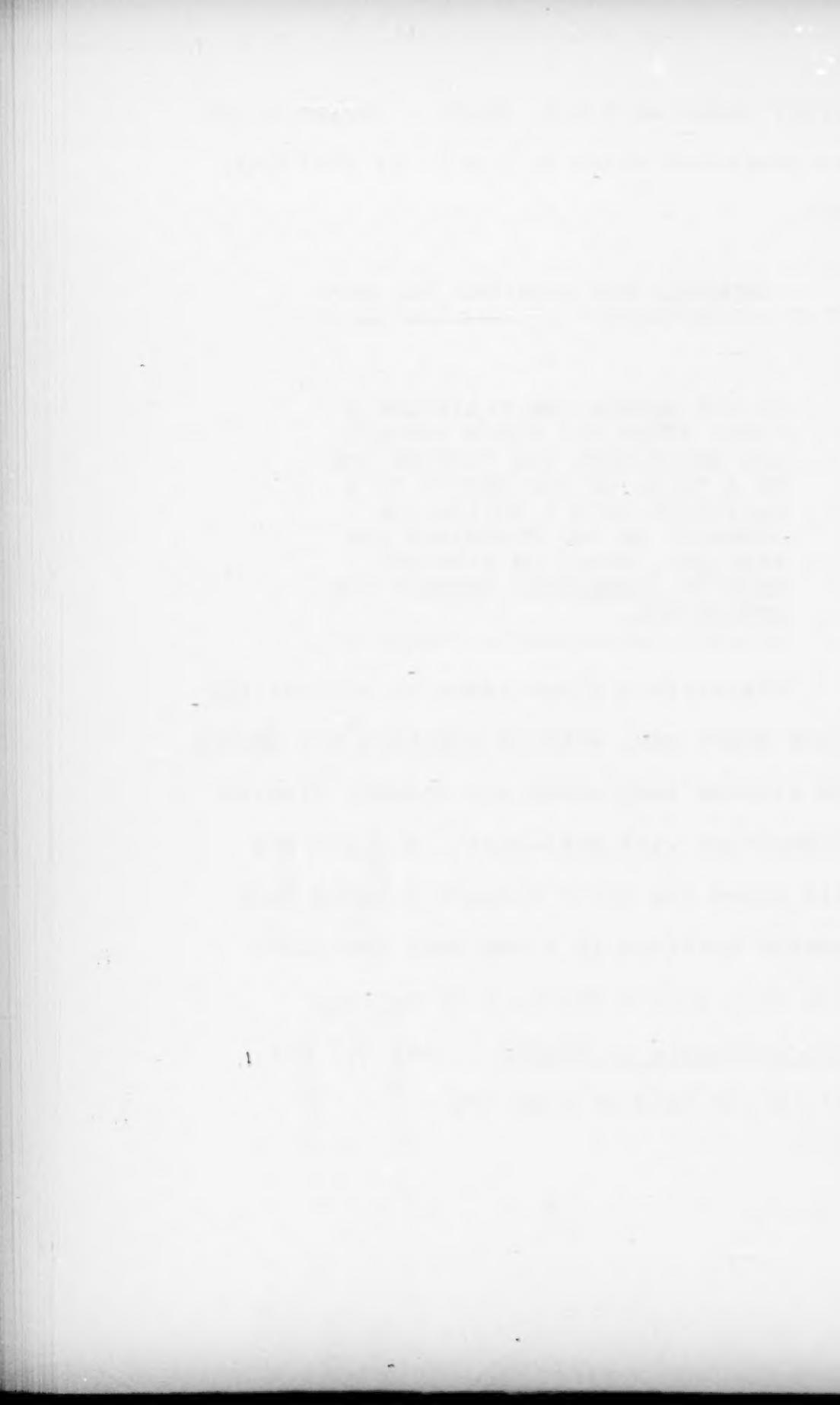
relief under 28 U.S.C. §2201. Jurisdiction was conferred under 28 U.S.C. §§ 1331 and 1343.

REASONS FOR GRANTING THE WRIT

I.

BY NOT ADDRESSING PLAINTIFF'S FIRST ISSUE THE NINTH CIRCUIT HAS SANCTIONED THE DEPRIVATION OF A TRIAL ON THE MERITS TO A PLAINTIFF WITH A MOTION FOR JUDGMENT ON THE PLEADINGS FOR \$597,000, BASED ON NINETEEN SETS OF UNANSWERED REQUEST FOR ADMISSIONS.

Plaintiff's first issue is whether the State court may, without reaching the merits and without indicating any reason, dismiss a complaint with prejudice. By ignoring this issue the Ninth Circuit decided this federal question in a way that conflicts with this courts decision in Societe Internationale v. Rogers (1958) 357 U.S. 197, which held at page 209:



"These decisions establish that there are constitutional limitations upon the power of the court, even in aid of their own valid process, to dismiss an action without affording a party an opportunity for a hearing on the merits of his cause."

This rule is applicable to the state courts.

(See Societe Internationale, page 210.)

Here the State Courts violated this rule in the third opinion (see Appendix F). It is apparent in this third state court appeal that the court never reached the merits as the opinion reaffirms the dismissal without prejudice and on page F-26, footnote 1, rules that the merits are "superfluous."

Although the court discussed the law of the case, which in this case would not be the merits, and the joinder issue, not a word is offered to explain why the complaint is to be dismissed with prejudice.

Therefore the State Court violated the rule of Societe Internationale.



By not addressing the State Courts failure to provide Plaintiff with a trial on the merits the Ninth Circuit has sanctioned this violation of established judicial principals requiring this Court's supervision.

II.

BY NOT ADDRESSING PLAINTIFF'S SECOND ISSUE THE NINTH CIRCUIT HAS SANCTIONED PLAINTIFF BEING DEPRIVED OF A TRIAL ON THE MERITS BY NINE JUSTICES WHO, ON THREE APPEALS, FOUND AN "INDISPENSABLE PARTY" IN A TORT ACTION FOR MONEY DAMAGES WHEN SUCH ACTIONS HAVE NO SUCH PARTIES.

Plaintiff's second issue is whether the State Court Judges may be enjoined from finding an "indispensable party" in a tort action for money damages when such actions have no such parties and when these defendant judges have three times deprived Plaintiff of a trial on the merits with such a finding.



In California there are no indispensable parties in tort actions for the rule is:

"... it is not necessary to make all the parties to the tort defendants in an action for damages (Cooley on Torts, see 124-126)."

Moropoulos v. Fuller (1920) 186 Cal. 679.

Further, in this State action the indispensable party had been dismissed two years before trial and therefore had nothing to litigate by operation of law, her dismissal (California Code of Civil Procedure, Section 877.5). Further holding that a tort action for money damages has an indispensable party is to hold that the trial court lacked jurisdiction to order one party before the court to pay a sum certain to another party before the court. Since the California Superior Court is a court of general jurisdiction it always has such jurisdiction.



Moreover each of the nine justices on the three appeals have seen thousands of tort actions for money damages and criminal actions. In neither type action is the indispensable party issue ever raised. Then I presented nineteen sets of unanswered request for admissions and nine justices can find an indispensable party in unpublished opinions.

Since Plaintiff was three times deprived of a trial on the merits, which brings the error up to constitutional dimensions and since Plaintiff is still deprived of a trial on the merits he is entitled to injunctive relief (Dombroski v. Pfister (1965) 380 U.S. 479). Also, Younger v. Harris (1971) 401 U.S. 362, is not a bar as Plaintiff has no remedy in his efforts to receive a trial on the merits unless the federal court intervenes.

By ignoring this issue the Ninth Circuit is deciding an issue contrary to this Court's holding in Dombroski v. Pfister and sanctioning Plaintiff being deprived of a trial on the merits in an unconstitutional manner. This departs from accepted judicial proceedings so far as to call for an exercise of this Courts power of supervision.

III.

MAY PLAINTIFF PLEAD A CLAIM FOR RELIEF, ANY RELIEF, AGAINST STATE INTERMEDIATE COURT JUSTICES, INCLUDING COMPELLING THE ISSUANCE OF PRECALENDAR MEMORANDUM TO COUNSEL PRIOR TO ORAL ARGUMENT TO CURB THE JUSTICES ARBITRARY CONDUCT WHEN ISSUING UNPUBLISHED OPINIONS.

The Ninth Circuit memorandum held that Plaintiff was entitled to no relief against intermediate court justices no matter what he pled (Appendix A). Plaintiff sought other relief in addition to compelling the issuance of precalendar memorandum, such as

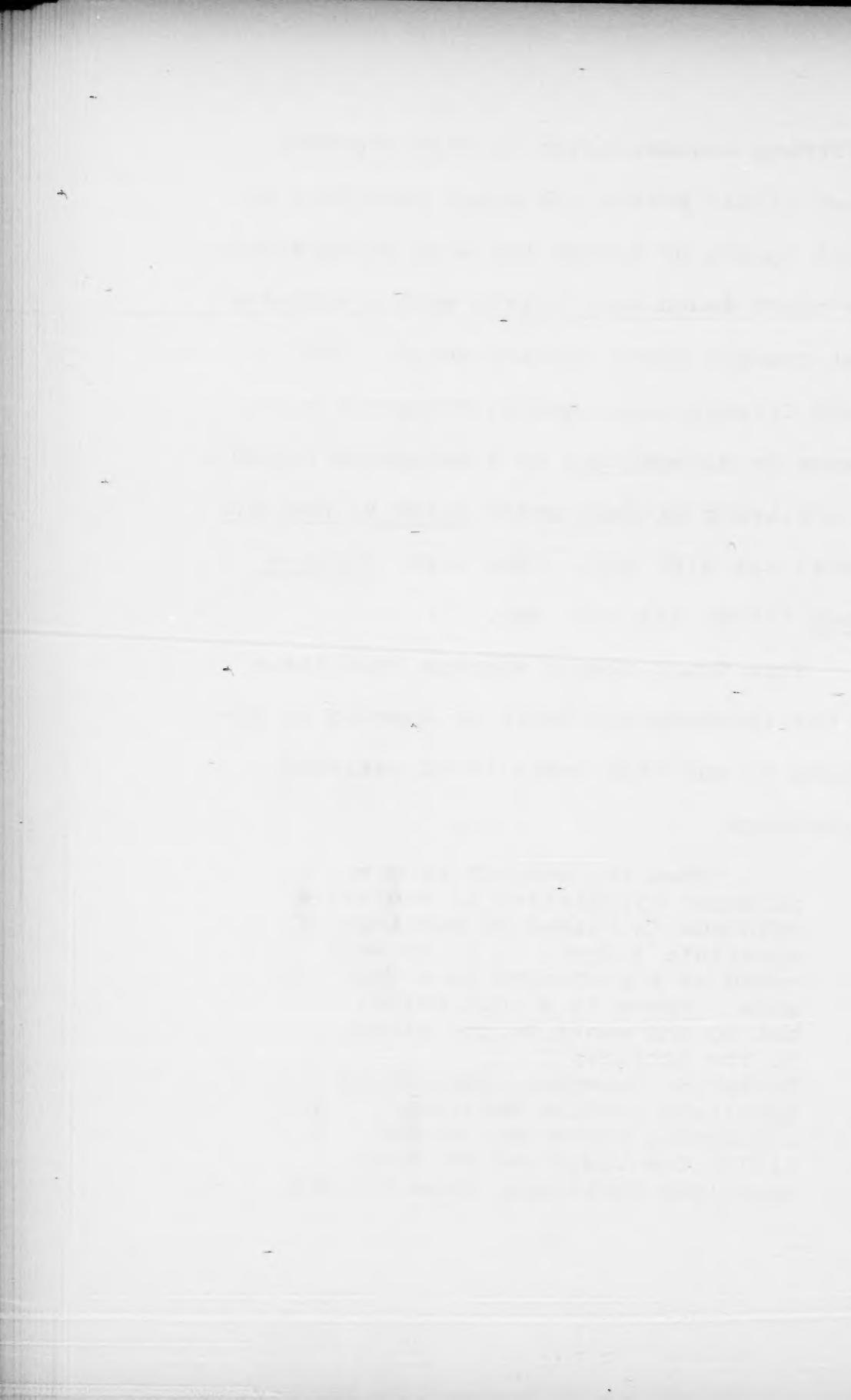


informing counsel prior to oral argument which of his points the court considers it might ignore or recast and what authorities the court found very likely with a computer that counsel knows nothing about. The Ninth Circuit also ignores Plaintiff's reliance on allegations of a pervasive pattern of arbitrary conduct under Allee v. Medrano (1974) 416 U.S. 802. (See also, Rizzo v. Goode (1975) 423 U.S. 362.

This Court should address this issue as the intermediate Court of Appeals is unlikely to and this issue is of national importance.

"When the subject of pre-calendar circulation of tentative opinions is raised at meetings of appellate judges, it is as welcomed as a porcupine in a dog show. There is a loud noise, but no one wants to get close to the intruder."

Robert S. Thompson, California Appellate Justice Retired, California State Bar Journal (1975) One Judge and No Judge Appellate Decisions, page 476, 518.



The above indicates that intermediate court judges find it difficult if not impossible to even consider Constitutional rights of litigants in this area. This issue concerns a mounting crisis of national importance. Justice Feinerman, who signed the second opinion in this case (Appendix G), in a recent interview, after pointing out problems of the concept of Rent an Appellate Panel, said:

"Feinerman said the advantage to the litigants is to have a panel on which 'all three judges have read the briefs.' Citing an article in the Arizona State Law Journal (Winter, 1986) by retired Justice Robert (S) Thompson and Professor J.B. Oakley of the University of California at Davis, Feinerman said the delegation of research and writing on the appellate bench to staff attorneys is such that some justices don't read the briefs before they rule.

"The article points out that in the days of Learned Hand, a justice could typically spend 25 hours in research and reflection on each major opinion. The hours available to the modern justice

are four."

Daily Journal, December 14, 1987,
page 23.

In California fiscal 1985-86, 86% of the opinions were unpublished (1987 Annual Report, Judicial Counsel of California).

Assuming that the published opinions get a proportionately greater share of the four hours per opinion, the 86% that are unpublished must be getting little or no time at all. At the same time that the justices are bypassing reading the briefs in the unpublished cases, oral argument is reduced to a token in state court and eliminated altogether in federal court. In the face of such a trend we must ask: Does the litigant have any rights in the Court of Appeal?

In this case Plaintiff has alleged, in great detail, a pervasive pattern of arbitrary conduct by defendants in three appeals. Plaintiff is entitled to some relief under



V



Justice Traynor said:

"As with cases or legal theories not covered by the briefs, it is only fair that the appellate court direct the attention of counsel to these materials, if it appears that they may affect the outcome of the case, and give them the opportunity to submit additional briefs. Consult Wyzanski, A trial Judges Freedom and Responsibility, 65 Harv. L.Rev. 1281 1295-6 (1952)."

Roger J. Traynor, 24 U. of Chicago L.Rev. 1956-57, page 211 at 219.

See also this court conduct in Katz v.

United States (1967) 389 U.S. 347.

This issue of circulation of precalendar memorandum is of national importance and should be heard by this Court.^{1/}

^{1/} Note the state court opinions assume that the law of the case raises to constitutional dimensions and can be used to deprive a litigant of a trial on the Merits ignoring the unjust decision exception. People v. Shuey (1975) 17 Cal.3d 835.



IV.

BY UNDERSTATING PLAINTIFF'S FOURTH ISSUE THE NINTH CIRCUIT HAS SANCTIONED A DISQUALIFIED JUSTICE ARGUING AGAINST PLAINTIFF IN CALENDAR CONFERENCE, DEPRIVING PLAINTIFF OF NOTICE AND AN OPPORTUNITY TO BE HEARD.

More than two years prior to the third appeal, Defendant Klein was disqualified for cause in the state action. She argued from the bench at oral argument and the next day reported Plaintiff to the State Bar. She also ruled on accepting a supplemental brief. I assume she argued at conference too. She therefore breached her duty under Calif. Rules of Court, Rule 14(b) to file an amicus curiae brief or remain moot. Since she was not setting on any case she was not immune (Stump v. Sparkman (1978) 435 U.S. 349), and Plaintiff brought suit under 42. U.S.C. 1983. There is an appearance of impropriety in



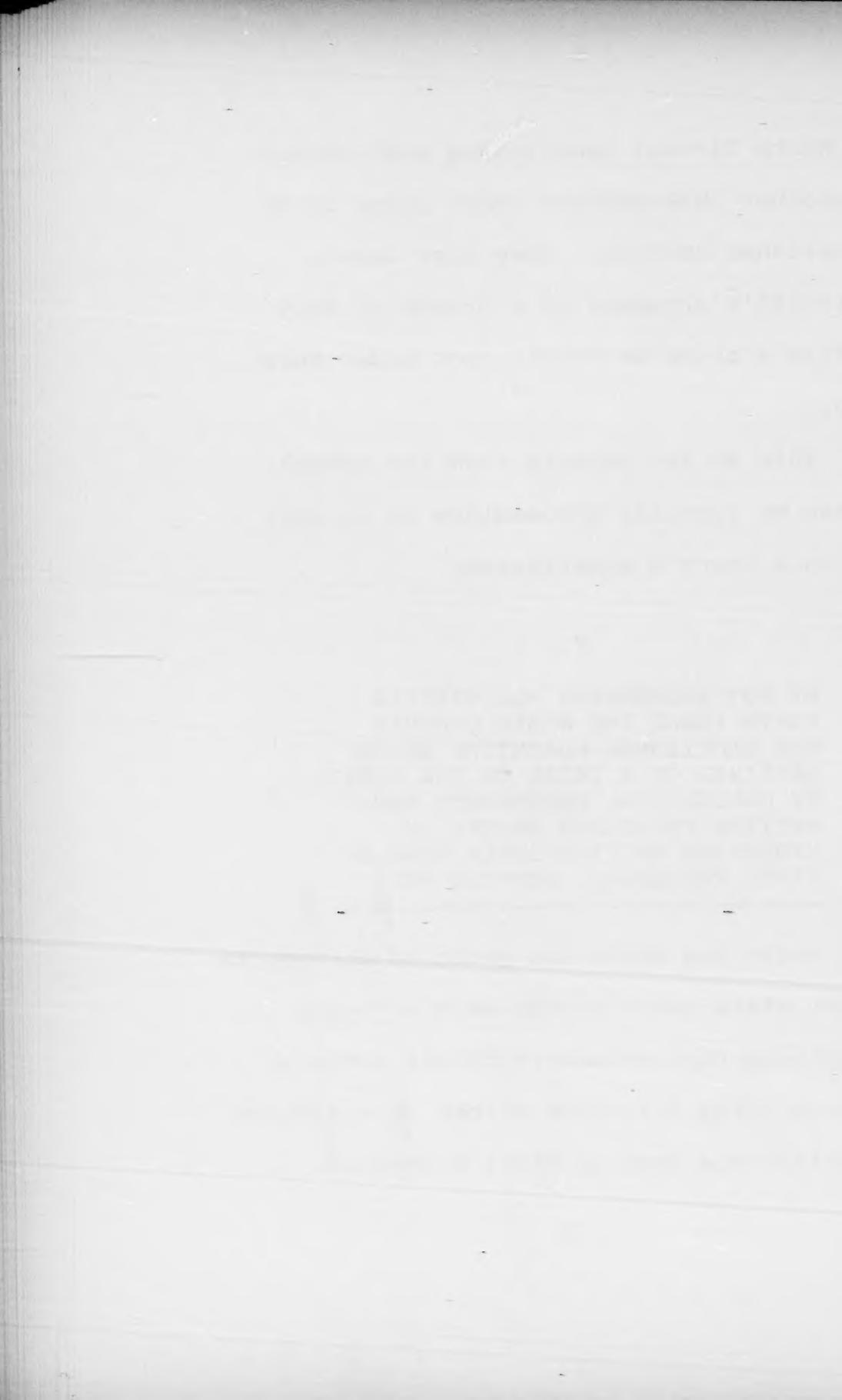
the Ninth Circuit sanctioning such conduct of another intermediate court judge in an unpublished opinion. They also ignore Plaintiff's argument of a breach of duty to file a brief or remain moot under Rule 14(b).

This so far departs from the normal course of judicial proceedings as to call for this Court's supervision.

V.

BY NOT ADDRESSING PLAINTIFF'S FIFTH ISSUE THE NINTH CIRCUIT HAS SANCTIONED PLAINTIFF BEING DEPRIVED OF A TRIAL ON THE MERITS BY NONJUDICIAL DEFENDANTS SUBMITTING FRIVOLOUS BRIEFS IN VIOLATION OF CALIFORNIA CODE OF CIVIL PROCEDURE, SECTION 907.

While the above was going on defendants in the state court action were actively soliciting this unconstitutional activity by submitting frivolous briefs in violation of California Code of Civil Procedure,



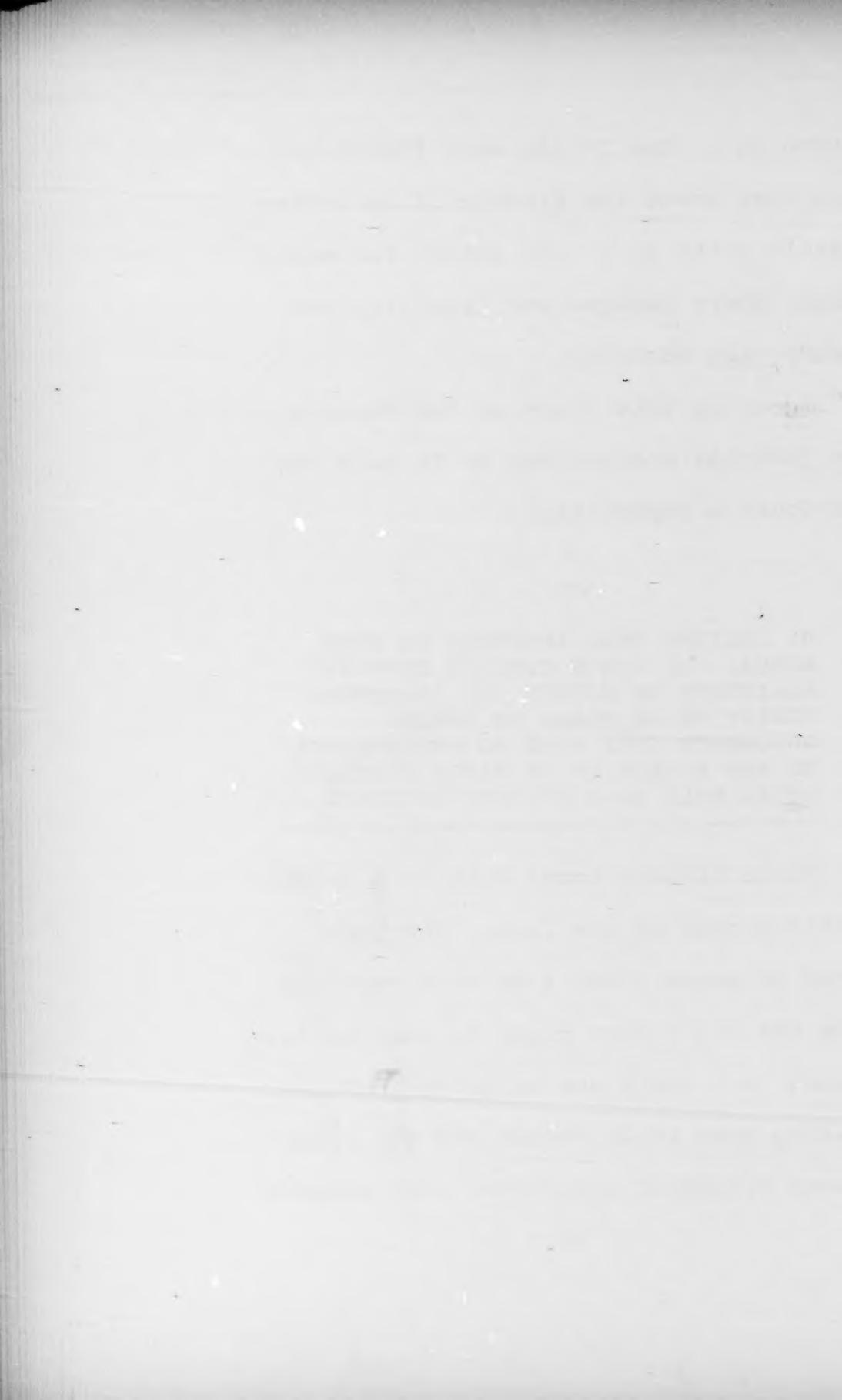
Section 907. The briefs were frivolous since they urged the finding of an indispensable party in a tort action for money damages where damages and liability had already been admitted.

Ignoring this issue so far departs from judicial proceedings as to call for this Court's supervision.

VI.

BY DENYING ORAL ARGUMENT IN THIS APPEAL THE NINTH CIRCUIT DEPRIVED PLAINTIFF OF NOTICE AND AN OPPORTUNITY TO BE HEARD ON THEIR ARGUMENTS THAT BORE NO RESEMBLANCE TO THE BRIEFS OR IS NINTH CIRCUIT LOCAL RULE 34-4 UNCONSTITUTIONAL..

Ninth Circuit Local Rule 34-4 is unconstitutional on its face. The rule quoted on pages 4 and 5 of this petition gives the court more power to control its calendar but there are no guidelines indicating when it is proper and not proper to deny litigants arguments. For example,



if we add to the rule "oral argument will not be denied when the court's calendar memorandum contains authorities that are not in the briefs," now that is objective and designed to preserve litigants rights. Nothing in the rule preserves litigants rights. Further relying on the court to preserve litigants rights went out when felons were allowed to have attorneys.

This court should give guidance as to when litigants rights to oral argument are to be preserved to protect the litigant, not the court.

Respectfully submitted,
JOHN F. KILGROE, PRO SE



APPENDIX A

FILED AUG 10 1987
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN F. KILGROE,) No.
Plaintiff-Appellant) 86-6514
)
v.) D.C. #
ARMAND ARABIAN, et al.,) CV-85-
Defendants-Appellees.) 5725-MRP
)

MEMORANDUM*

Appeal from the United States District
Court for the Central District of
California

Mariana R. Pfaelzer, District Judge,
Presiding, Submitted June 19, 1987**

BEFORE: HUG, SCHROEDER, and NORRIS,
Circuit Judges.

This is a civil rights action under
42 U.S.C. § 1893 seeking damages and

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. (34(a)).



equitable relief. The defendants are ten California state appellate court justices of the Second Appellate Division, the seven Justices of the California Supreme Court, and the plaintiff's former wife, her parents, and her attorneys. The plaintiff alleged that these defendants conspired under color of state law to deprive him of constitutionally protected rights.

The district court granted the appellee's motion to dismiss the complaint on the ground that the complaint failed to state a ground for relief. We affirm.

Specifically, Kilgroe sought an order requiring:

1. Prompt filing of all calendar memoranda in the public court file and the elimination of "secret" files.
2. Distribution to the parties of proposed dispositions prior to oral argument.



3. Notification to the parties prior to oral argument whenever the panel's view of the facts or the issues differ from those of the appellant.

4. Notification to the parties prior to oral argument of any facts or authorities not in the briefs upon which the court may rely.

We review *de novo* the dismissal of a complaint without leave to amend, viewing the facts favorably in support of jurisdiction. Whittington v. Whittington, 733 F.2d 620, 621 (9th Cir. 1984). We must reverse the dismissal unless we find beyond doubt that the defects in the complaint could not be cured by amendment. We so find.

Judges are absolutely immune from actions for money damages for judicial acts taken within the jurisdiction of their courts. Ashelman v. Pope, 793 F.2d 1072,



1075 (9th Cir. 1986) (en banc). Thus the nine court of appeals justices are shielded from liability for the opinions and rulings of which the plaintiff complains. In addition, no facts are alleged which would subject the Supreme Court Justices to liability for their failure to interfere in the decisions of the appellate justices. Whether or not Justice Klein's letter to the state bar is protected by judicial immunity as a "judicial act," that communication did not violate any of plaintiff's constitutional or statutory rights, and therefore is not the proper subject of an action under 42 U.S.C. § 1983. See Baker v. McCollan, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692 (1979). Nor did her handling of a letter written by Kilgroe to the Second Appellate Division implicate constitutional rights. Id.



Plaintiff has cited, and we have found, no authority even hinting that a judicial panel's refusal to share the products of its preliminary consideration constitutes a violation of due process.

Plaintiff's claim is wholly insubstantial and frivolous. See generally Comment, The Law Clerk's Dut of Confidentiality, 129 U. Pa. L. Rev. 1230 (1981); see also Matter of Certain Complaints Under Investigation, 783 F.2d 1488, 1518-20 (11th Cir.), cert. denied, 106 S.Ct. 3273 (1986). A plaintiff bringing an insubstantial and frivolous claim has no right to recover.

Cf. Jackson Transit Authority v. Local Division 1285, 457 U.S. 15, 21 n.6, 102 S.Ct. 2202, 2206 n.6 (1982); Ellis v. Cassidy, 625 F.2d 227, 229 (9th Cir. 1980).

The final question involves Kilgroe's motion to disqualify Judge Pfaelzer for bias. For the reasons stated in Judge



Tashima's January 8, 1986 order, particularly the complete absence of any extra-judicial source of bias, plaintiff's motion was properly denied.

The judgment below is AFFIRMED.



APPENDIX B

FILED OCT 9 1987
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN F. KILGROE,) No. 86-6514
Plaintiff-Appellant)
MRP) D.C. # CV-
) 85-5725-MRP
)
V.) (Central
ARMAND ARABIAN, et al.,) District of
Defendants-Appellees.) California)

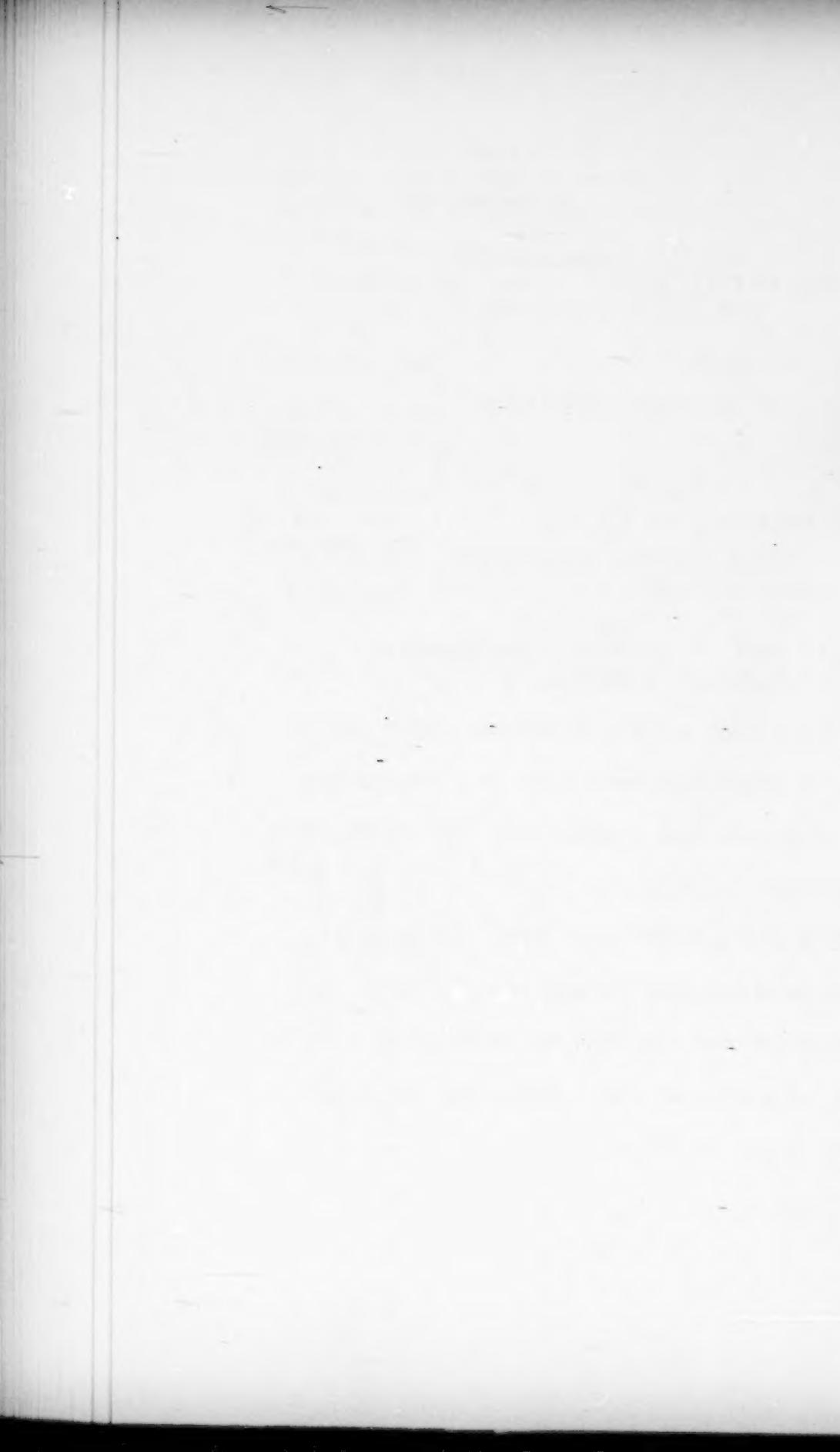
ORDER

Before: HUG, SCHROEDER, and NORRIS,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

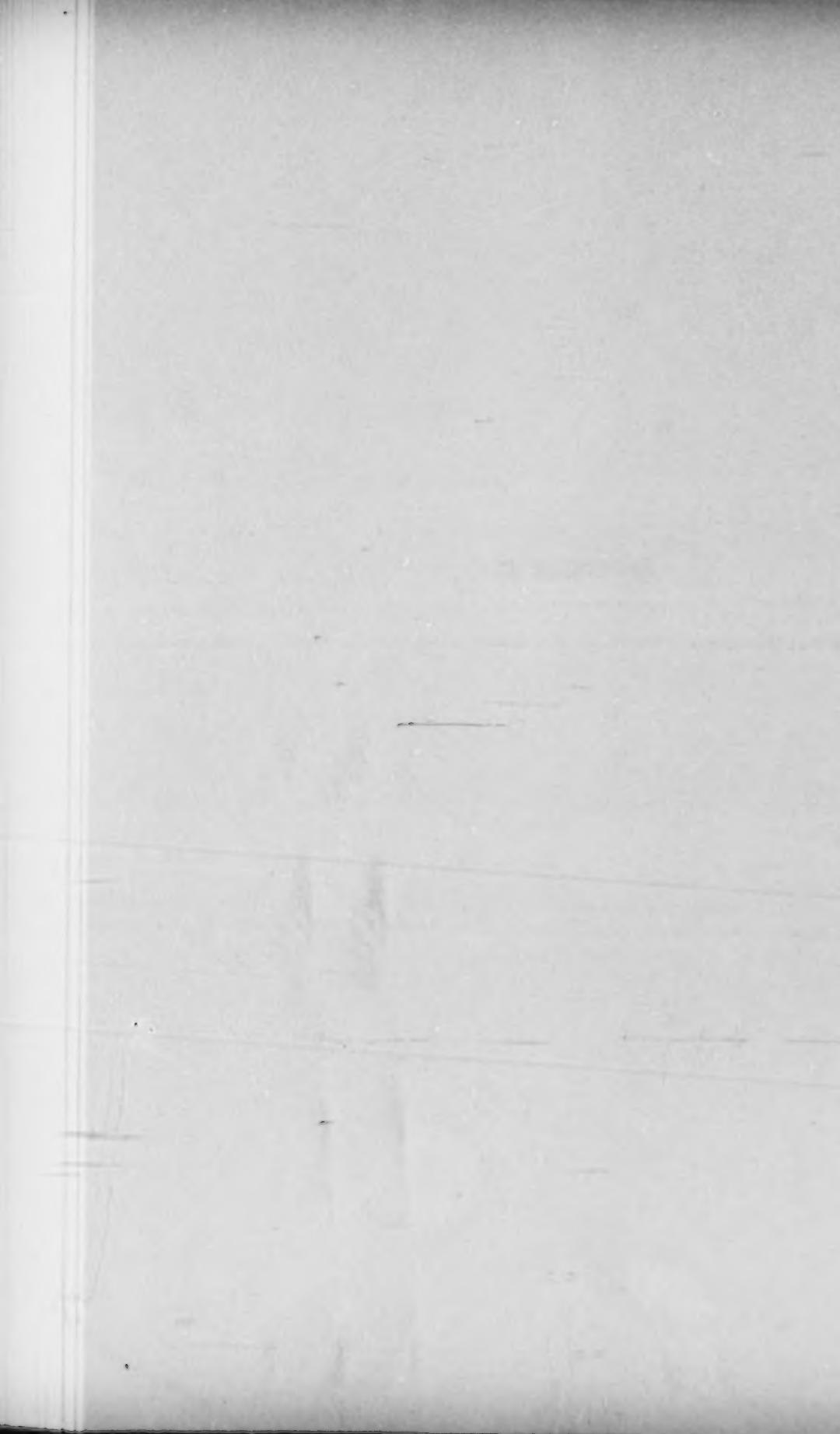
Fed. R. App. P. 35(b).



The petition for rehearing is denied
and the suggestion for rehearing en banc
is rejected.



APPENDIX C



FILED NOV 5 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

By (init.)

Deputy

ENTERED NOV 12 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By (init.)

Deputy

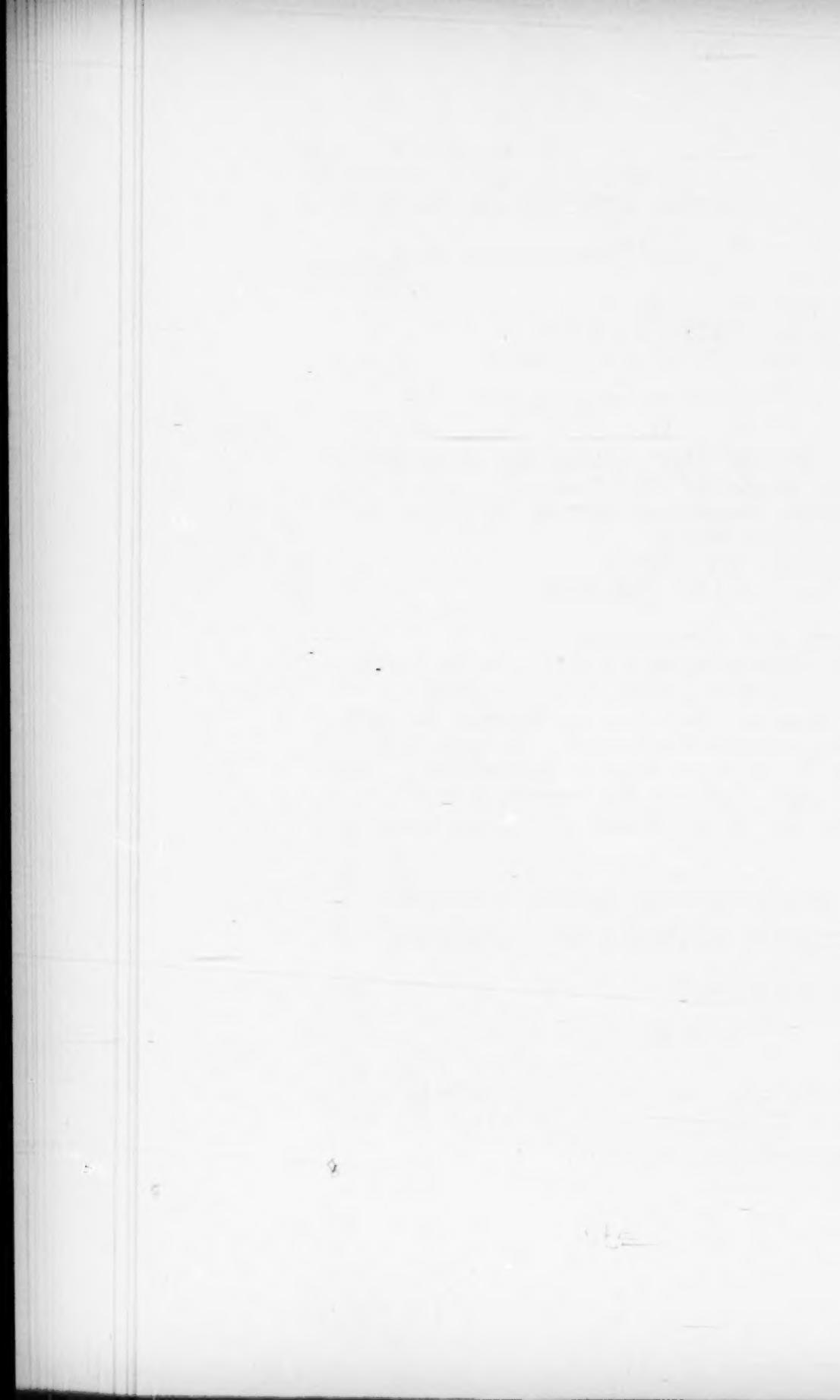
JOHN K. VAN DE KAMP, Attorney General
of the State of California
VERA FISCH, Deputy Attorney General
3580 Wilshire Blvd.
Los Angeles, CA 90010
Telephone: (213) 736-2326

Attorneys for Defendants

Rose Elizabeth Bird, Stanley Mosk, Otto
Kaus, Allen Broussard, Cruz Reynoso,
Joseph Grodin, Malcolm L. Lucas, Armand
Arabian, George Danielson, Elwood Lui,
Herbert L. Ashby, Robert Feinerman, James
H. Hastings, Lester Wm. Roth, Lynn D.
Compton, Edwin F. Beach and Joan Dempsey
Klein

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN F. KILBROE,) No. 85-5725 MRP
Plaintiff,) (McX)
v.)
ARMAND ARABIAN, et al.,) ORDER OF
Defendants.) DISMISSAL



The motion to dismiss of defendants Rose Elizabeth Bird, Stanley Mosk, Otto Kaus, Allen Broussard, Cruz Reynoso, Joseph Grodin, Malcolm Lucas, Armand Arabian, George Danielson, Elwood Lui, Herbert L. Ashby, Robert Feinerman, James H. Hastings, Lester Wm. Roth, Lynn D. Compton, Edwin F. Beach and Joan Dempsey Klein came on regularly for hearing in the above entitled case on Octover 21, 1985 before the Honorable Mariana R. Pfaelzer, United States District Judge. Vera Fisch, Deputy Attorney General appeared for the above named defendants. John F. Kilgroe appeared in pro per.

The court considered written and oral argument and made its decision to dismiss the above entitled action with prejudice on the ground that the complaint failed to state a claim for relief;



IT IS HEREBY ORDERED, good cause
appearing therefore that the above entitled
action against the above named defendants
is dismissed with prejudice.

DATED (November 5, 1985

/s/

United States District Court Judge

VF:cem



APPENDIX D



FILED NOV 22 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By (init.) Deputy

ENTERED NOV 25 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By (init.) Deputy

Law Offices of
JOHN R. SKOOG
10100 Santa Monica Boulevard
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(213) 556-3399

Attorney for Defendants Richard M. Pittenger,
Phyllis Pittenger, Mary Kilgroe
aka Mary Pittenger, John R.
Skoog, Jerol Hodges and Richard
E. Hodge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN F. KILGROE,) No. 85-5725 MRP
Plaintiff,) (Mcx)
v.)
ARMAND ARABIAN, et al.,) ORDER OF
Defendants.) DISMISSAL

)

The motion to Dismiss filed by Defendants Richard M. Pittenger, Phyllis Pittenger,



Mary Kilgroe aka Mary Pittenger, John R. Skoog, Jerol Hedges and Richard E. Hodge came on regularly for hearing in the above entitled cause on November 19, 1985 before the Honorable Mariana R. Pfaelzer, United States District Judge. John R. Skoog, Esq. appeared for the above named Defendants, and John F. Kilgroe, Esq. appeared in pro per.

The Court considered written and oral argument and rendered its decision to dismiss the above entitled action, with prejudice, on the grounds that the complaint failed to state a claim for relief.

The Court further denied Plaintiff's motion to file an amended complaint;

IT IS HEREBY ORDERED, good cause appearing therefore, that the above entitled action against the above named Defendants is dismissed with prejudice.

DATED: (November 22, 1985)

/s/

United State District Court judge



APPENDIX E



FILED SEP 15 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

ENTERED SEP 17 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN F. KILGROE, —) Case No. CV 85-
Plaintiff,) 5725-MRP
v.)
ARMAND ARABIAN, et al.,) ORDER DENYING
Defendants.) MOTION FOR NEW
) TRIAL AND FOR
) RELIEF FROM
) JUDGMENT
)

Plaintiff's motion for new trial and
for relief from judgment having come on
for hearing before the Honorable Mariana
R. Pfaelzer on February 3, 1986, and the
Court having considered the papers filed
and the oral presentation of plaintiff,

IT IS ORDERED that the motion for new
trial and for relief from judgment is denied.



DATED: (September 12, 1986

Mariana R. Pfaelzer
United States District Judge

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)



APPENDIX F



COURT OF APPEAL, SECOND DIST.
FILED APR 11 1985
CLAY ROBBINS, JR. Clerk

Deputy Clerk

NOT TO BE PUBLISHED
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

JOHN F. KILGROE,) 2d Civ.
v. Plaintiff and) B005895
Appellant,)
RICHARD M. PITTINGER, et al.,)
Defendants and)
Respondents.)
No. C 137831)

APPEAL from order of the Superior
Court of Los Angeles County. Norman
Epstein, Judge. Affirmed.

John F. Kilgroe, Plaintiff and Appel-
lant in propria persona.

John R. Skoog for Defendants and
Respondents.



Plaintiff and appellant John F. Kilgroe (appellant) appeals from the trial court's denial of his motions to vacate or modify a judgment, for judgment on the pleadings, for summary judgment and for sanctions, in favor of Richard M. Pittenger, Phyllis Pittenger, John R. Skoog, Jerod Hodges, and Hodge & Hodges, a partnership (respondents). Appellant also appeals from the trial court's order imposing sanctions against him (Code Civ. Proc., § 128.5). We affirm the orders of the trial court.

FACTS

This litigation has previously come before this Court of Appeal. The case began in 1975, when appellant sued his former wife Mary Kilgroe, her parents (the Pittengers), and the attorneys who represented Mary in a proceeding for dissolution of marriage. Appellant alleged in his complaint that



respondents fraudulently induced him to transfer title to his life insurance policy to the control of Mary's parents and attorneys, converted community property, and conspired to deprive appellant of these properties.

Appellant requested and received, as to his former wife Mary, a dismissal of the action with prejudice, as he elected to proceed only against her parents and her attorneys (Code Civ. Proc., § 581).

Thereafter, respondent attorneys moved to dismiss the three causes of action against them (fourth, fifth and sixth) on the basis they did not state a cause of action. The Pittengers moved to dismiss the four causes of action against them (first, second, third and seventh) under Code of Civil Procedure section 389, on the ground that Mary, an indispensable party to the action, had been dismissed



with prejudice by appellant. The trial court granted the attorneys' motion to dismiss the causes of action against them with prejudice and granted the Pittengers' motion to dismiss the causes of action against them without prejudice on the ground that an indispensable party could not be joined.

Appellant appealed from the trial court's order of dismissal without prejudice as to the four causes of action against the Pittengers. Division Two of this Court held that Mary was an indispensable party and that the absence of such indispensable party deprived the court of jurisdiction to proceed. It therefore affirmed the trial court's judgment of dismissal without prejudice.

After the remittitur issued, appellant moved to set aside the judgment of dismissal without prejudice, to amend his complaint to add Mary and for sanctions against



the attorneys. Respondents opposed the motion by reiterating their argument that Mary, an indispensable party, had been voluntarily dismissed by appellant with prejudice. The trial court denied appellant's motions to set aside its previous judgment, to allow appellant to amend his complaint to add Mary and for sanctions.

Appellant appealed for the second time from the trial court's denial of his motions. Division Five of this Court affirmed the trial court's denial of the motions, holding that a party dismissed with prejudice cannot be sued for the same wrongs by the party dismissing her, that in this case Mary, who was voluntarily dismissed by appellant was an indispensable party, and that the trial court had no jurisdiction to proceed.

Before the remittitur issued on this second appeal, appellant filed another



motion in the trial court, again seeking to set aside the trial court's October 6, 1981, judgment of dismissal without prejudice on the basis that Mary was an indispensable party to the action, and again seeking sanctions against the attorneys. Appellant's motion contained the following paragraph:

"A denial will result in any [sic] immediately appealable order, as this is a motion after judgment. But since the judgment to be set aside is a judgment of dismissal without prejudice litigation will not terminate. I will continue on an appearant [sic] endless loop. I can file a motion in trial court, lose, appeal and lose there and return to trial court and refile ad infinitum. The court should be concerned with ending the litigation in this case filed in 1975."



Respondents opposed the motion on the basis that two Court of Appeal opinions had affirmed the trial court's refusal to assume jurisdiction on the basis that Mary, an indispensable party to the action, could not be joined. Finally, respondents also requested sanctions pursuant to Code of Civil Procedure section 128.5.

The trial court denied appellant's motion to vacate or modify the judgment, and for other relief, and admonished appellant not to carry out his threat to renew his motion following each denial by the trial court. The court stated in its order that if appellant chose to carry out that threat it would impose sanctions under section 128.5.

Thereafter, appellant moved for reconsideration of his motions pursuant to Code of Civil Procedure section 1008. Respondents opposed the motion and renewed their request

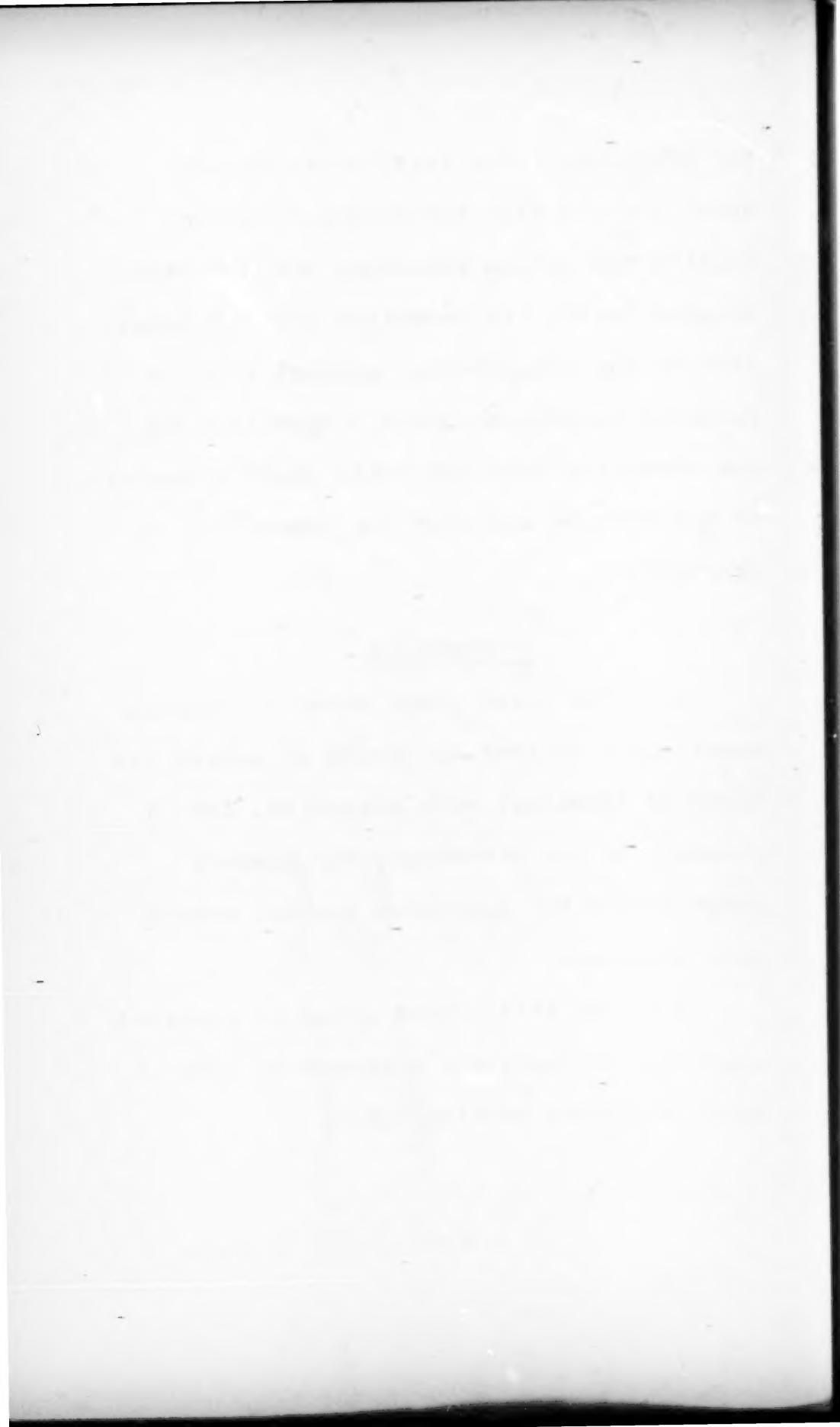


for sanctions. The trial court denied appellant's motion for reconsideration, finding the motion frivolous and not made in good faith. It therefore ordered appellant to pay respondents' counsel \$350 pursuant to section 128.5. Appellant is now appealing from the trial court's denial of his motions and from the imposition of sanctions.

CONTENTIONS

1. The trial court erred in denying appellant's motions to vacate or modify its order of dismissal with prejudice, for judgment on the pleadings, for summary judgment and for sanctions against respondent attorneys.

2. The trial court erred in imposing sanctions on appellant pursuant to Code of Civil Procedure section 128.5.



DISCUSSION

1. The trial court's denial of appellant's motion to vacate or modify its order of dismissal without prejudice was proper because, according to the doctrine of the "law of the case," the trial court lacked jurisdiction to proceed.

The law-of-the-case doctrine makes it abundantly clear that appellant's contentions are completely lacking in merit. "'The doctrine of "law of the case" deals with the effect of the underlying first appellate decision and on the subsequent retrial or appeal: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.' (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 633, p.



4552.) (Italics in original.)" (Selby Constructors v. McCarthy (1979) 91 Cal. App.3d 517, 522.)

The following "law of the case" has been established by the two prior appellate decisions rendered in this case:

a. A party, like Mary Kilgroe, who has been voluntarily dismissed with prejudice from a lawsuit, cannot be sued for the same wrongs by the plaintiff who dismissed her. (Kronkright v. Gardner (1973) 31 Cal.App.3d 214, 216-219; Wouldridge v. Burns (1968) 265 Cal.App.2d 82, 84; 4 Witkin, Cal. Procedure (2d ed. 1971) Proceedings Without Trial, § 55, p. 2720.)

b. Mary Kilgroe is an indispensable party to this action. (Code Civ. Proce., § 389; Bank of California v. Superior Court (1940) 16 Cal.2d 516, 521-522; 3 Witkin, Cal. Procedure (2d ed. 1972) Pleading, §134, pp. 1806-1808.)



c. A trial court has no jurisdiction to proceed without an indispensable party. (Bank of California v. Superior Court, supra, 16 Cal.2d at pp. 522-523; 3 Witkin, Cal. Procedure, supra, Pleading, § 133, pp. 1805-1806.)

In light of the foregoing law of the case, appellant is absolutely precluded from maintaining this action.^{1/}

2. The trial court's imposition of sanctions pursuant to Code of Civil Procedure section 128.5 was proper.

Under Code of Civil Procedure section 128.5, subdivision (a), the trial court may order a party or a party's attorney, or both, to pay reasonable expenses

^{1/} Our holding makes superfluous any consideration of appellant's additional contentions concerning the denial of his motions for judgment on the pleadings, for summary judgment and for imposition of sanctions against respondent attorneys.



resulting from frivolous actions, including making motions without good faith.

(Karwasky v. Zachay (1983) 146 Cal.App.3d 679, 681.) A motion is frivolous and in bad faith where, as here, any reasonable attorney would agree that the motion is, without question, totally devoid of merit. (Ibid.) Therefore, appellant was properly ordered to pay respondents' counsel \$350 pursuant to section 128.5.

Moreover, when it appears to the reviewing court that an appeal was frivolous or taken solely for delay it may add to the costs on appeal such damages as may be just. (Code Civ. Proc., § 907; see California Rules of Court, rule 26, subd. (a); In re Marriage of Flaherty (1982) 31 Cal.3d 637, 645-654; Maple Properties v. Harris (1984) 158 Cal.App.3d 997, 1005-1012.) Any further appeal in regard to this matter will require that such sanctions be imposed.



DISPOSITION

The trial court's orders denying appellant's motions and imposing sanctions (Code Civ. Proc., § 128.5) are affirmed. The trial court is directed to enter a dismissal with prejudice as to appellant's entire complaint.

NOT TO BE PUBLISHED

ARABIAN, J.

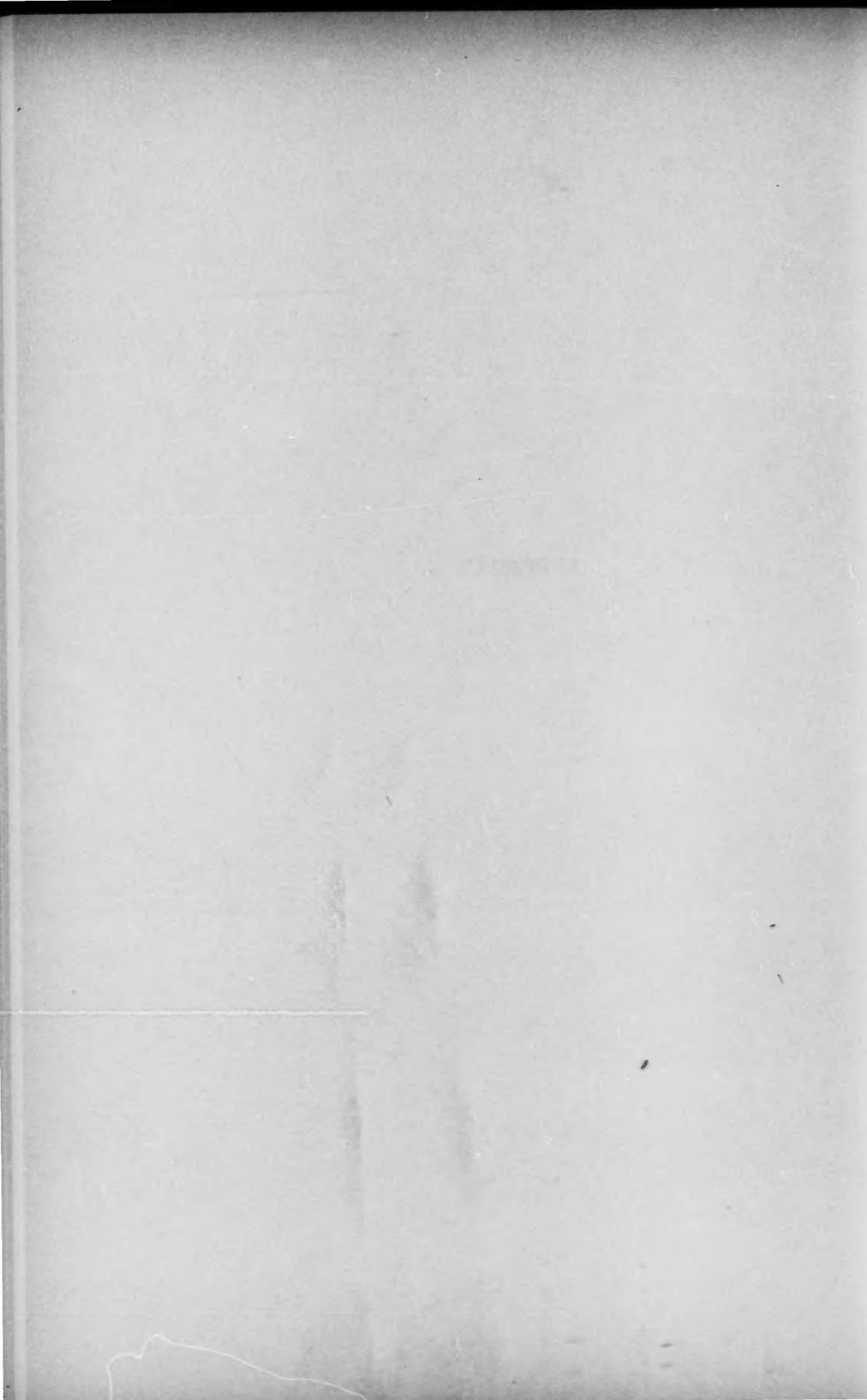
We concur:

LUI, Acting P.J.

DANIELSON, J.



APPENDIX G



COURT OF APPEAL, SECOND DIST.
FILED
CLAY ROBBINS, JR. CLERK

Deputy Clerk

NOT TO BE PUBLISHED
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

FRED KILGROE,) 2d Civil
Plaintiff and) No. 67349
Appellant,)
v.) (Super. Ct.
) No. C137831)
RICHARD M. PITTINGER et al.,)
Defendants and)
Respondents.)

APPEAL from an order of the Superior Court of Los Angeles County. Sara Kleban Radin, Judge. Affirmed.

Fred Kilgroe, in pro. per., for Plaintiff and Appellant.

John R. Skoog for Defendants and Respondents.



Fred Kilgroe appeals from an order denying his motion to set aside a judgment of dismissal and to amend his complaint to add an indispensable party. We affirm.

This apparently interminable litigation, which has reached the appellate court once before, began in 1975, when appellant, after a dissolution from his former spouse, Mary Kilgroe, sued Mary, her parents, and the attorneys who represented Mary in the dissolution. Appellant alleged that these defendants fraudulently induced him to transfer his life insurance policy to the control of Mary's parents and attorneys, converted community property, and conspired to deprive appellant of these properties. Appellant then requested and received a dismissal with prejudice of the action against his former wife, proceeding only against the parents and attorneys, respondents herein. (Code Civ. Proc., § 581.)



Thereafter, respondents moved to dismiss the case on the grounds that an indispensable party, Mary Kilgroe, had been dismissed with prejudice by appellant. The court heard the motion and appellant's opposition, and in October 1981 dismissed the case under section 389 of the Code of Civil Procedure without prejudice. Appellant elected not to amend his complaint, but to appeal the dismissal. The appellate court found that Mary Kilgroe indeed was an indispensable party and affirmed the dismissal. (Kilgroe v. Pittenger (July 16, 1982, 2 Civ. 63934.)

After remittitur, appellant proceeded to file a motion to set aside the trial court's previous judgment of dismissal without prejudice, and to amend his complaint to add his former wife. Respondents opposed the motion by simply reiterating their previous argument that Mary had been voluntarily dismissed by appellant with



prejudice and had been found an indispensable party. On November 24, 1982, the trial court denied appellant's motion, and the instant appeal has resulted.

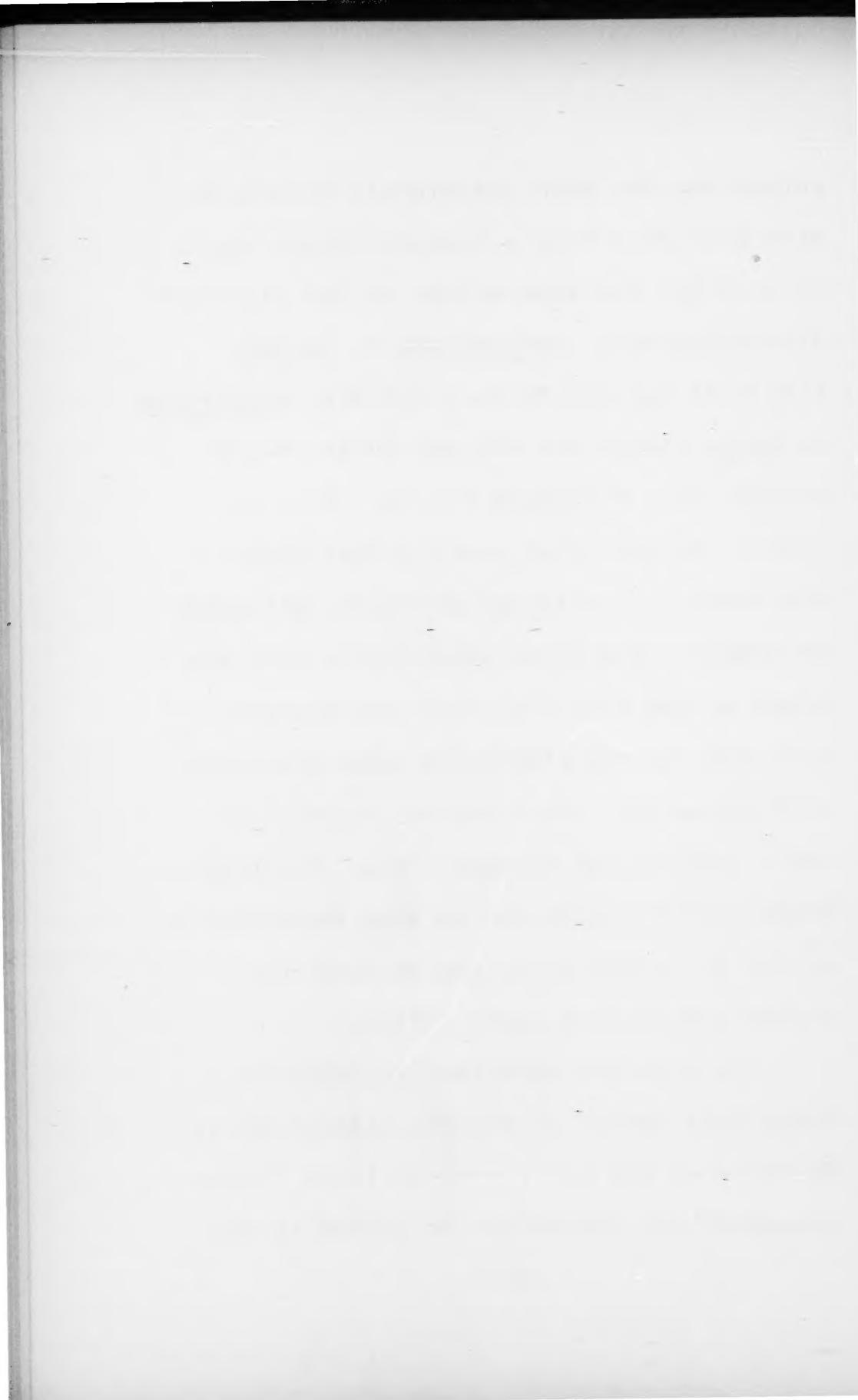
This second appeal lacks all merit since it presents precisely the same issue already determined by appellant's previous appeal. Appellant argues that he must be permitted to cure the defect in his pleadings by adding Mary to the complaint. The previous appeal, however, has already determined this to be impossible. A judgment of dismissal for lack of an "indispensable party" can result only if the trial court finds that a person indispensable to the litigation cannot, under present circumstances, be made a party to the suit.

(Code Civ. Proc., section 389; Bank of California v. Superior Court (1940) 16 Cal.2d 516, 521-523; 3 Witkin, Cal. Procedure (2d ed. 1972) pp. 1805-1808.) A



person who has been voluntarily dismissed with prejudice from a lawsuit cannot again be sued for the same wrongs by the plaintiff dismissing her. (Kronkright v. Gardner (1973) 31 Cal.App.3d 214, 216-219; Wouldridge v. Burns (1968) 265 Cal.App.2d 82, 84; 4 Witkin, Cal. Procedure (2d ed. 1971) p. 2720.) As the trial court's 1981 order discloses, its original decision, affirmed on appeal, to dismiss appellant's case was based on the fact that Mary was indispensable but, having previously been dismissed with prejudice, could not be joined. In 1982, nothing had changed; thus, the trial court had no choice but to deny appellant's motion to rejoin Mary, and we have no choice but to once again affirm.

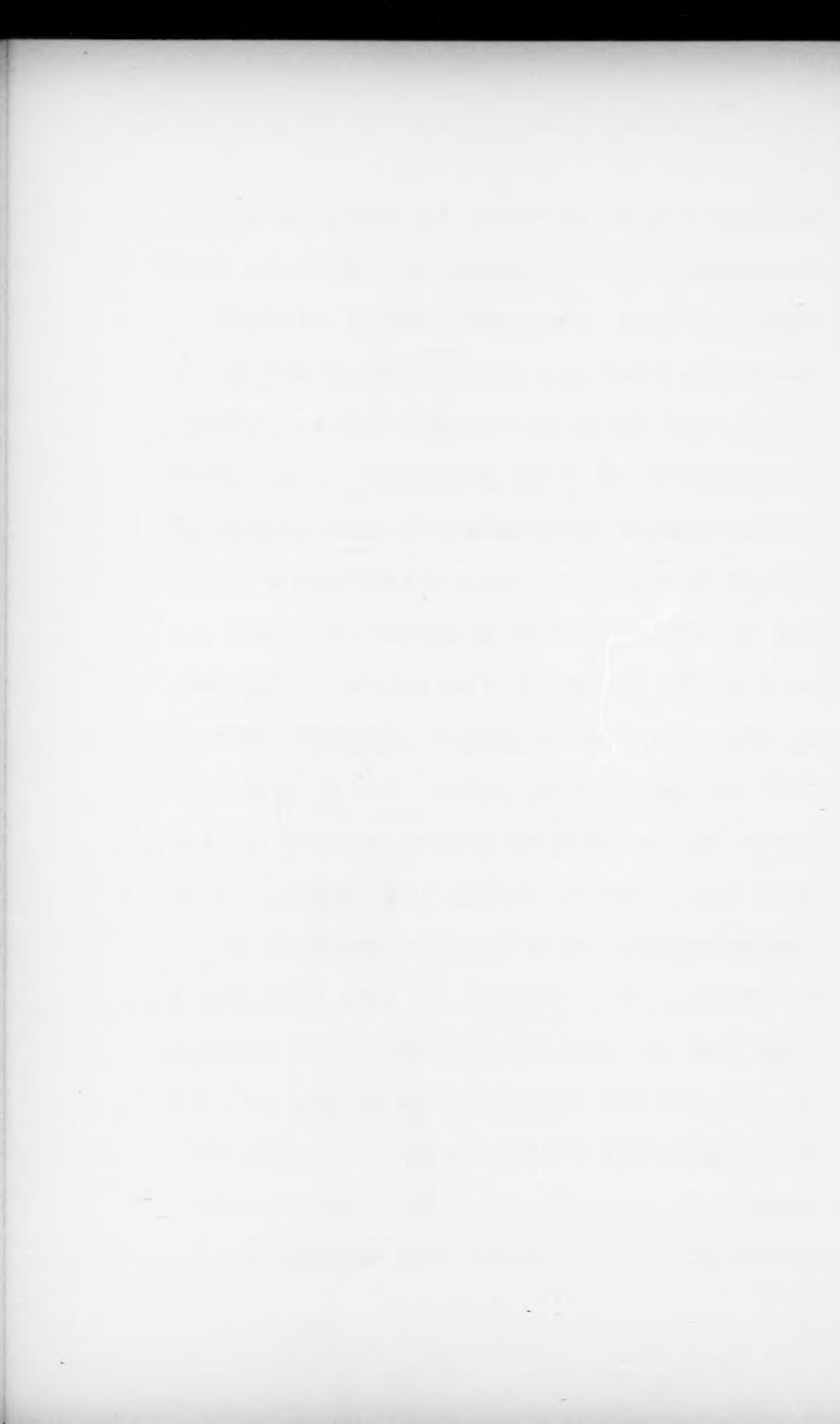
The argument appellant proffers to avoid this result is utterly without merit. He contends any party once declared "indispensable" may thereafter be joined in the



cause of action as a matter of right. Such a rule, of course, renders dismissal of a case for lack of an indispensable party an absurdity and would dispense with such "minor" requirements as personal and subject matter jurisdiction. The cases appellant relies on do not support his position. In Wilson v. Bittick (1965) 63 Cal.2d 30, the trial judge found that one Bittick was an indispensable party and ordered that he be made a defendant. When the plaintiff, Wilson in defiance of the judge's orders, thereafter voluntarily (but apparently without prejudice) dismissed Bittick, the court granted codefendant Frakes' motion to dismiss the action under Code of Civil Procedure section 389. Wilson then filed a new lawsuit, this time adding Bittick to the complaint. The Supreme Court affirmed this procedure, stating: "[Section 389] expressly provides that in cases of refusal



to comply with an order to bring in an indispensable party, which in effect is what happened here, the court 'shall dismiss without prejudice' all causes of action to which such party is indispensable. After a dismissal 'without prejudice,' of course, a new lawsuit asserting the same causes of action but joining the indispensable party may be instituted as a matter of right within the period of limitation." (Id. at p. 35. See also Wilson v. Frakes (1960) 178 Cal.App.2d 580, 585.) The Wilson cases merely granted a recalcitrant plaintiff the right to remedy the absence of an indispensable party brought about solely by his previous refusal to join that party; they did not address themselves to a situation where the plaintiff is unable to join the party, and certainly do not hold, as appellant suggests, that any party, once declared indispensable, can thereafter



automatically be joined.

In the instant case, not a single fact or circumstance has changed since the trial court's original dismissal of the case in 1981. While relief from a voluntary dismissal may sometimes be granted under Code of Civil Procedure section 473 (Isaacs v. Jones (1933) 135 Cal.App. 47, 48), appellant made absolutely no application for such relief and indeed expressly asserts to us that he is not proceeding under that section or under any claim of extrinsic fraud or mistake. Instead, he simply reasserts the question already presented and determined on his prior appeal. (See DiGenova v. State Board of Education (1962) 57 Cal.2d 167, 179.) Our affirmance of the trial court's order denying his motion to add the indispensable party follows inevitably.^{1/}

^{1/} (See p. G-37)



The judgment is affirmed.

NOT TO BE PUBLISHED.

ASHBY, J.

We concur:

FEINERMAN, P. J.

HASTINGS, J.

1/ Our holding makes superfluous any consideration of appellant's additional contentions concerning the denial of his motion for summary judgment against respondents.



APPENDIX H



COURT OF APPEAL, SECOND DIST.
FILED JUL 16 1982
CLAY ROBBINS, JR. CLERK

Deputy Clerk

NOT FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

FRED KILGROE,) 2 Civ. No.
Plaintiff and) 63934
Appellant,)
v.) (Super.Ct.
RICHARD M. PITTINGER, et al.,)
Defendants and)
Respondents.)

APPEAL from a judgment of the Superior
Court of Los Angeles County. Howard J.
Thelin, Judge. Affirmed.

Fred Kilgroe, in pro. per., for Plaintiff and Appellant

John R. Skoog, for Defendants and Respondents.



NATURE OF APPEAL:

Plaintiff appeals judgment of dismissal of action upon his failure to amend complaint to add indispensable party.

BACKGROUND:

Appellant and his former wife were parties to a dissolution. Therein certain properties and other interests were awarded to wife. After the dissolution, plaintiff brought an action against wife, her parents and her attorneys, alleging that defendants fraudulently induced appellant to transfer his life insurance policy to the control of wife's parents and attorneys, conversion of community furniture to the use of the parents, conversion of a car, and conspiracy to deprive appellant of those properties and \$400 in a credit union account.



Appellant voluntarily dismissed the action with prejudice as to the wife.

On August 24 the matter was sent out for trial. The remaining defendants (respondents) moved for dismissal of the action because of the absence of wife as an indispensable party. The trial court dismissed the action without prejudice. Appellant did not amend the complaint but filed this appeal. On appeal appellant claims the wife is not an indispensable party and that the trial court erred in failing to honor appellant's motion to disqualify the trial judge. We reject appellant's contentions and we affirm.

DISCUSSION:

1. The Indispensable Party Issue

California Code of Civil Procedure section 389 in pertinent part here provides as follows:



"(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. [§] (b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a



party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

This section clearly calls for the exercise of discretion in performing the duty of the trial court to determine

whether or not a party is an indispensable party. The absence of an indispensable party deprives the trial court of jurisdiction to proceed. (Bank of California v. Superior Court (1940) 16 Cal.2d 516; wilson v. Frakes (1960) 178 Cal.App.2d 580; Warner v. Pacific Tel. & Tel. Co. (1953) 121 Cal.App.2d 497.) At bench the trial court's determination that Mary Kilgroe wasn an indispensable party was a proper exercise of authority and jurisdiction. (Bank of California v. Superior Court, supra; Warner v. PACIFIC Tel. & Tel. Co., supra) and the result of that determination cannot be undermined by the unilateral and voluntary dismissal of such indispensable party by plaintiff alone. (Wilson v. Frakes, supra.)

The determination of the former spouse's rights to the several properties involved is basic and raises issues on which the



rights of the other defendants depend and which demonstrates whether the acts of the other defendants on behalf of the wife as her agents was right or wrong. It would have been improper and unfair for appellant to circumvent the determination of these issues by eliminating the spouse as a party in order to proceed and try to make respondents alone responsible. (Wilson v. Frakes, supra, Warner v. Pacific Tel. & Tel. Co., supra.)

Because the determination of whether a party is indispensable or necessary is a matter addressed to the sound discretion of the trial court in the first instance, its exercise of that discretion will not be disturbed in the absence of a clear and convincing showing of an abuse of that discretion. (Bank of California v. Superior Court, supra, 16 Cal.2d 516.)



2. The motion to Disqualify Judge Thelen

Appellant made no effort to disqualify the trial judge until after the matter had been sent out for trial. It was apparently at trial that defendant's motion for dismissal was made and heard on the ground of failure to join an indispensable party.

Appellant's effort to disqualify Judge Thelen was purportedly made pursuant to California Code of Civil Procedure section 170, subdivision (a)(5), for cause, rather than pursuant to the provisions of Code of Civil Procedure 170.6 (the peremptory challenge).

The motion was correctly stricken and disregarded. The motion was untimely.

A motion such as that made is provided for under Code of Civil Procedure section 170, subdivision (a); however, subdivision (d) of section 170 in pertinent part here provides: "The statement of a

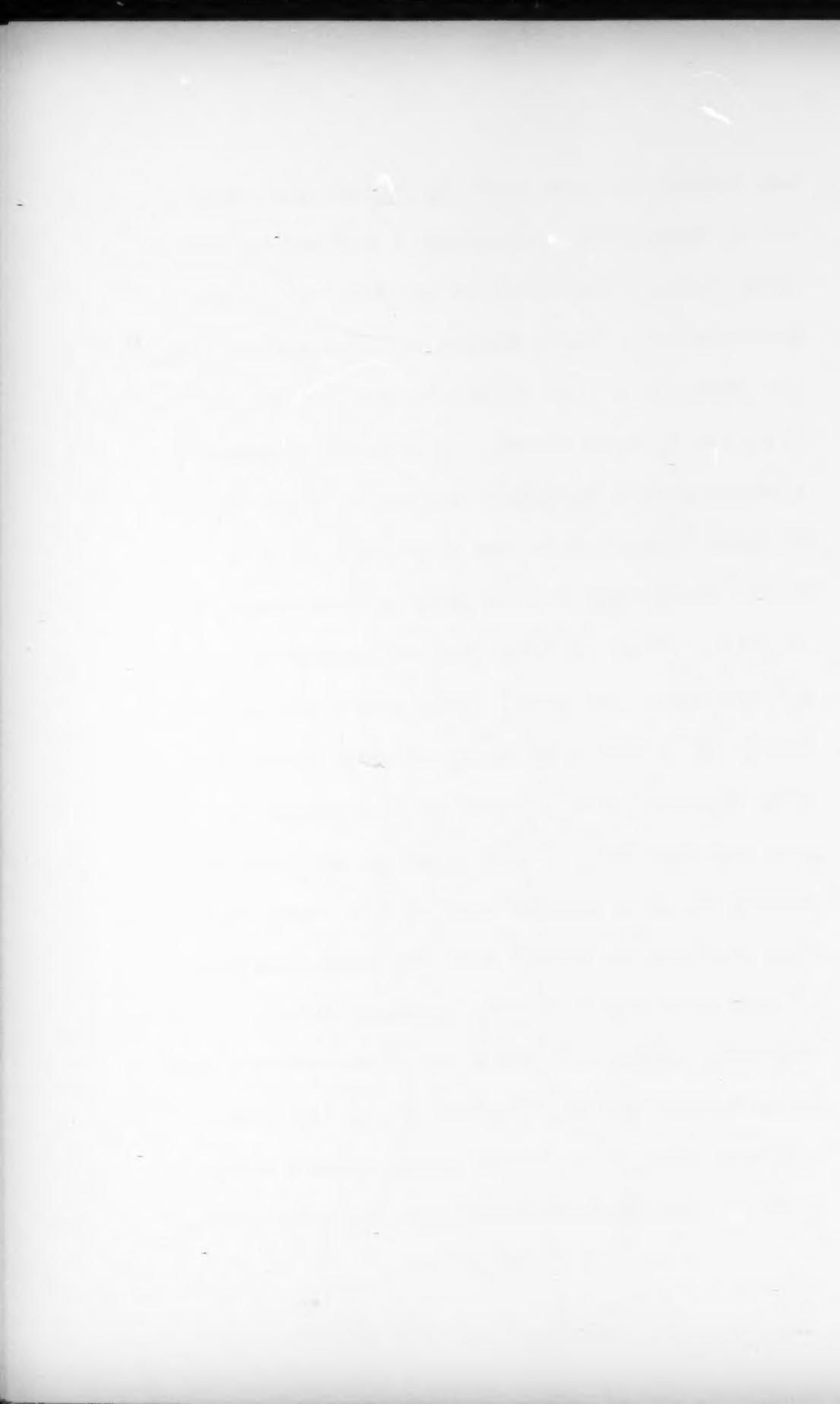


party objecting to the judge on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge."

On its face the affidavit and motion is untimely because it was made after the commencement of the hearing of an issue of fact in the action. Even assuming that the stated grounds present bias or prejudice, which was not learned until the date of the hearing, August 25, 1981, still the motion was untimely in that it was not made until two weeks later on September 8, 1981. Moreover, the motion was ambiguous and in effect contradictory because it was made subsequent, supplemental to and as part of



two other motions made by appellant upon which appellant requested a ruling by the very judge attempted to be disqualified. Assuming for the purpose of discussion that the remark of the trial judge was as indicated by appellant, "I like Mr. Skoog, [respondent's lawyer] and don't like Mr. Kilgroe [appellant, an attorney in proper]" that remark was made at the hearing itself. Even if impolite or possibly injudicious, it still does not rise to the level of a clear showing of prejudice or bias against the lawyer or his cause but may reflect simply the court's opinion of appellant's presentation of his case and his conduct in court and the poor quality of his written and oral presentation. However, appellant does not demonstrate how this remark actually prejudiced the case against appellant. Our independent examination of the record discloses no prejudicial



error in the ruling by the trial court on the principal question of the dismissal without prejudice for failure to name an indispensable party.

Accordingly, the judgment is affirmed.

NOT FOR PUBLICATION.

/s/ _____, J
BEACH

We concur:

/s/ _____, P.J.
ROTH

/s/ _____, J.
COMPTON